No. 15,174

IN THE

United States Court of Appeals

For the Ninth Circuit

AMERICAN PIPE & STEEL CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING AND PETITION FOR REHEARING IN BANC.

M. MITCHELL BOURQUIN,
Crocker Building, San Francisco 4, California,
GEORGE DELEW,
Crocker Building, San Francisco 4, California,
Attorneys for Petitioner.

Index

Table of Authorities Cited

Cases

Statutes

Texts

No. 15,174

IN THE

United States Court of Appeals

For the Ninth Circuit

AMERICAN PIPE & STEEL CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING AND PETITION FOR REHEARING IN BANC.

To the Honorable William E. Orr, James Alger Fee and Stanley N. Barnes, Associate Justices of the United States Court of Appeals for the Ninth Circuit:

REASONS WHY A REHEARING SHOULD BE GRANTED.

1. In a case in which the decision of the Tax Court consists of nothing more than a recital of the testimony of the witnesses and the conclusion that the respondent had not erred, the Court of Appeals has undertaken to make the findings of fact which the Tax Court failed to make in order to affirm the decision.

2. The Court of Appeals is not empowered to make findings of fact.

3. The Tax Court does not comply with the statutory requirement for findings of fact by ruling that the respondent did not err.

> *It must not be; there is no power in Venice*
> *Can alter a decree established:*
> *'Twill be recorded for a precedent;*
> *And many an error by the same example*
> *Will rush into the state.*

THE QUESTION OF FACT INVOLVED HAS BEEN DECIDED BY THE COURT OF APPEALS AND NOT BY THE TAX COURT.

The Petition for Redetermination addressed to the Tax Court (I.R.C. §272(a)(1)) presented a question of fact which is stated in the opinion of the Tax Court as follows:

> "Fundamentally, the question to be resolved is whether the principal purpose motivating American Pipe's acquisition of Palos Verdes was the evasion or avoidance of income or excess profits taxes through obtaining thereby tax benefits otherwise unavailable to it within the proscription of section 129, Internal Revenue Code of 1939." (Tr. 75-6.)

The question is simply a question of the purpose and intent of petitioner in its acquisition of Palos Verdes.

The question of whether a corporation is availed of for the purpose of tax advantage is a pure question of fact. *C.I.R. v. DeMille* (9th Cir.), 90 F. (2d) 12, cited and followed in *J. M. Perry Co. v. C.I.R.* (9th Cir.), 120 F. (2d) 123, 125; *Rubino v. C.I.R.* (9th Cir.), 186 Fed. (2d) 304. It is *not* a conclusion of law. *Regals Realty Co. v. C.I.R.* (2nd Cir.), 127 F. (2d) 931. See Mertens, Law of Federal Income Taxation, Vol. 9, §51.20, pp. 408-9.

The Tax Court omitted to find whether the principal purpose for which petitioner acquired Palos Verdes Estates was or was not the evasion or avoidance of income or excess profits taxes, and made no finding whatsoever of the purpose motivating petitioner's acquisition of Palos Verdes. The issue—the question involved—was simply not decided by the Tax Court.

The "Findings of Fact and Opinion" of the Tax Court consist merely of a summary or recital of the evidence pre-

sented. Without indication of its belief or disbelief of any of the evidence, the Tax Court approved the determination of respondent with the conclusions that the evidence did not establish that the respondent erred and that the petitioner had not successfully carried its burden of proof. A comparison of the opinion filed with the published decision of the Tax Court (25 T.C. 351) graphically demonstrates that the Court of Appeals has assumed to bridge the gap and determine the ultimate fact for itself.

Comparison of the Opinion of the Court of Appeals with the Decision of the Tax Court.

Tax Court (25 T.C. 351).	Court of Appeals.
"On the basis of the foregoing facts, we arrive at the ultimate conclusion that the evidence does not establish that respondent erred in holding that the evasion or avoidance of income or excess profits taxes . . . was the principal purpose for which American Pipe acquired the capital stock of Palos Verdes."	"A close scrutiny of the reasons for the purchase of Palos Verdes reveals that any corporation formed to do business in the real estate field would have satisfied the alleged needs of American Pipe. *The reasons advanced by petitioner* that its acquisition of a practically defunct corporation was the potential value of the lots *does not overshadow the conclusion that the acquisition was for a huge potential tax benefit.*" (Italics ours.) Opinion, p. 5.
And that: "Although intent is a state of mind, it is none the less a fact to be found, . . . The Commissioner having determined that the tax benefit to be gained was the principal purpose behind the acquisition, it was petitioner's burden to prove that such determination was erroneous. After a careful study of the record made, we have concluded that petitioner has not successfully carried his burden of proof. We have accordingly so found."	

Clearly the result is an exchange of functions. The Court of Appeals had assumed the duty of the Tax Court to find the essential fact (I.R.C. §1117(b); *Gillette's Estate v. C.I.R.* (9th Cir.) 182 Fed. (2d) 1010); and the Tax Court has usurped the appellate function to determine whether a finding is "clearly erroneous." I.R.C. §1141(a). The Tax Court's function is not that of a court of review. Mertens, Law of Federal Income Taxation, Vol. 9, §51.19, p.

403; *Helvering v. Nat'l Grocery Co.,* 304 U.S. 282. The Court of Appeals is not empowered to make findings of fact. *Helvering v. Rankin,* 295 U.S. 123.

THE TAX COURT MADE NO FINDINGS WHATEVER OF THE PURPOSE FOR WHICH PETITIONER ACQUIRED PALOS VERDES AND THE CONCLUSIONS THAT RESPONDENT DID NOT ERR OR THAT PETITIONER HAS NOT CARRIED ITS BURDEN OF PROOF WILL NOT SUSTAIN THE DECISION.

The Tax Court made no finding and expressed no conclusion that the acquisition of Palos Verdes was for a potential tax benefit or that such purpose overshadowed the reasons advanced by petitioner. These are the findings of the Court of Appeals (ante p. 5). It is the duty of the Tax Court to find the facts upon which the validity of a proposed deficiency depends, since only its rulings of law are subject to review by the Appellate Court. If the Tax Court fails to find the facts, the case should be remanded with instructions. Mertens, Law of Federal Income Taxation, Vol. 9, §50.93, pp. 334-6; *Helvering v. Rankin,* 295 U.S. 123. Nowhere in the decision of the Tax Court is there any finding of the purpose for which Palos Verdes was acquired.

The Statements of the Tax Court that the Respondent Did Not Err and that the Petitioner Did Not Sustain Its Burden of Proof Are Conclusions of Law and Do Not Meet the Requirement for Findings of Fact.

"It is the duty of the Board of Tax Appeals to find the facts upon which the validity of the proposed deficiency tax depends. Upon the petition to review, we are concerned only with the question as to whether or

not the facts found sustain the legal conclusions deduced therefrom.

. . .

"All that we had said in this matter is for the purpose of emphasizing the fact that there is no direct finding by the Board of Tax Appeals on the ultimate fact involved in the determination of this appeal and, consequently, that the case must be returned to them for such a finding." *Belridge Oil Co. v. Helvering* (9th Cir.), 69 F. (2d) 432 (cited and followed in *Helvering v. Rankin,* 295 U.S. 132).

The statement contained in the "Findings of Fact and Opinion" that the evidence does not establish that respondent erred is not a finding of fact but a conclusion of law and will not sustain the decision. *Diller v. C.I.R.* (9th Cir.), 91 Fed. (2d) 194; cf. *Doernbecher Mfg. Co. v. C.I.R.* (9th Cir.), 80 F. (2d) 573; *Harbor Plywood v. C.I.R.* (9th Cir.), 143 F. (2d) 780.

In *Diller v. C.I.R.,* ante, the finding held *in*sufficient parallels the conclusion in the instant case. Compare:

Findings.

Diller case.	**This case.**
"From the facts before us, we are of the opinion that the contention of the respondent is correct . . . ." [did not err.]	"On the basis of the foregoing facts, we arrive at the ultimate conclusion that the evidence does not establish that respondent erred . . . ."

In reversing and remanding the *Diller* case with instructions to make findings and render such decision thereupon as the facts may warrant, this Court says:

"These statements do not constitute findings by the Board. . . . A determination of these questions of fact was and is necessary to a decision of the case.

. . .

> "The duty thus imposed on the Board [to make findings] cannot be assumed by this court. Our review of the Board's decision is limited to questions of law. We are not authorized to make findings of fact." 91 F. (2d) 194.

The statement that the petitioner has not carried its burden of proof is not a finding of fact and will not sustain the decision of the Tax Court. A finding that a party has or has not sustained the burden of proof as to a designated issue is a legal conclusion and not a finding of fact. 53 Am. Jur. 787; 89 C.J.S. 487; *U.S. v. Jefferson Electric Mfg. Co.,* 291 U.S. 386.

In *U.S. v. Jefferson Electric Mfg. Co.,* ante, the asserted finding again parallels the conclusion of the Tax Court in this case. Compare:

Findings.

Jefferson Electric case.	**This case.**
"As to this issue, I find that for the taxable period involved in case No. 3371, the plaintiff has sustained the burden of proof."	"After a careful study of the record made, we have concluded that petitioner has not successfully carried his burden of proof. We have accordingly so found."

The issue stated in the *Jefferson Electric* case was whether the taxes in question were paid entirely by the plaintiff and neither directly nor indirectly by the plaintiff's purchasers. In reversing the decision of the District Court for insufficiency of the finding quoted, the Supreme Court says:

> "Whether the special findings give the requisite support to the judgments rendered thereon is a different question and is one which is open to consideration

here. The findings are long and the view which we take of *one* of them makes it unnecessary to state the others. The one relates to the matter made essential by subdivision (a) (2) of section 424, and is the only finding on the subject.

. . .

"Saying that the plaintiff has sustained the burden of proof as to the designated issue in suit No. 3371 is not an adequate finding of the matters of fact involved in that issue, particularly where, as here, the subject is new and may admit of differing opinions. It is in the nature of a legal conclusion rather than a finding of the underlying facts, and we think it does not adequately respond to the issue and is not sufficient to support the judgment which rests on it." (291 U.S. 407-9.)

The duty of the Tax Court to make findings upon the question involved is a positive duty and is not fulfilled by the recital of probative facts. In *Belridge Oil Co. v. Helvering* (9th Cir.), 69 F. (2d) 432 (cited and followed in *Helvering v. Rankin,* 295 U.S. 132), this Court had occasion to declare:

"The 'findings of fact' of the Board of Tax Appeals are concerned largely with the recital of probative facts. There is no finding therein of the actual cash value of the option. It is only from the statements in the opinion and from the fact that judgment was entered for the respondent . . . that the actual cash value of the option is to be inferred."

Compare:

Norris v. Jackson, 9 Wall. 125, 126:

"The findings required are not a mere report of the evidence but a statement of the ultimate facts on

> which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes and not the evidence on which those ultimate facts are supposed to rest."

Manifestly, the decision of the Tax Court does not meet or fulfill the requirement for findings of fact and does not merit the approval of this court. As a matter of fact, the expressions of this court at the argument of the case clearly indicated a majority, if not a unanimous, view that the case must be remanded and that no other action would be proper.

THE COURT OF APPEALS IS NOT EMPOWERED TO WEIGH THE EVIDENCE AND MAKE FINDINGS WHICH THE TAX COURT FAILED TO MAKE. ITS DUTY IS TO REMAND THE CASE FOR FURTHER PROCEEDINGS.

It is not the function of the Court of Appeals to search the record and analyze the evidence in order to supply findings which the trial court has failed to make. *Kelley v. Everglades Drainage Dist.,* 319 U.S. 415. The rule is the same in cases from the Tax Court. *Belridge Oil Co. v. Helvering* (9th Cir.), 69 F. (2d) 432. In:

Helvering v. Rankin, 295 U.S. 123 at 131-2, the Supreme Court says:

> "If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board (citing cases). And the same procedure is appropriate *even when the findings omitted by the Board might be supplied from examination of the record."* (Italics ours.)

The review courts are without power on review of proceedings of the Tax Court to make any findings of fact. Mertens, Law of Federal Income Taxation, Vol. 9, §51.19, p. 396. To draw inferences, to weigh the evidence, and to declare the result is the function of the Tax Court. *Helvering v. National Grocery Co.,* 304 U.S. 271, 294. If the Tax Court fails to find the facts, the case must be remanded. *Diller v. C.I.R.* (9th Cir.) 91 F. (2d) 194; *Helvering v. Rankin,* 295 U.S. 123.

It is respectfully submitted:

1. That a rehearing should be granted to preserve uniformity of decision and to avert the confusion bound to ensue if the decision of the Tax Court is legitimatized.

2. That the importance of the questions of judicial procedure involved merits a rehearing in banc.

Dated, San Francisco, California,
May 14, 1957.

M. Mitchell Bourquin,
George DeLew,
Attorneys for Petitioner.